BOUSTEAD TRADING (1985) SDN. BHD.

v.

ARAB-MALAYSIAN MERCHANT BANK BERHAD

FEDERAL COURT, KUALA LUMPUR
DATO' ANUAR ZAINAL ABIDIN CJ MALAYA
DATO' WAN ADNAN ISMAIL FCJ
TUAN GOPAL SRI RAM JCA
[CIVIL APPEAL NO. 02-713-1993]
13 SEPTEMBER 1995

PRACTICE & PROCEDURE: *Estoppel - Requirement of proper pleading - Whether requirement met upon the material facts giving rise to estoppel sufficiently pleaded - Failure to plead - Whether necessarily fatal - Duty of Court - Justice of the case - Whether Court to decide where justice of the case lies - Order 18 rr. 7(1) & 8(1) Rules of the High Court 1980.*

PRACTICE & PROCEDURE: *Estoppel - Doctrine of - Utility - Whether a flexible principle - Restatement of the law - Requirements that representee must be induced and should have acted to his detriment - Whether an integral part of the doctrine of estoppel.*

CONTRACT: *Factoring agreement - Estoppel - Assignee indorsing new terms on invoice - Failure to object - Appellant continued making payment on indorsed invoices for seven months - Effect - Whether appellant estopped from denying validity of invoice and indorsement.*

This was an appeal against the judgment of the trial Judge ruling that under the terms of a factoring agreement entered into between the respondent and one Chemitrade, the appellant was liable to pay the respondent RM203,072.56. The facts were that Chemitrade was selling goods on credit to the appellant. The credit terms had strained Chemitrade's cashflow, and to alleviate the problem Chemitrade had entered into a factoring agreement with the respondent. By the agreement the respondent would purchase Chemitrade's invoices in respect of the goods at a discount and then claim its full value from the appellant at the end of the credit period. This agreement was executed with the appellant's consent.

Following the agreement, which it construed as "an assignment of debts", the respondent started to purchase the invoices from Chemitrade and had them forwarded to the appellant for payment. On each of these invoices the respondent had indorsed the statement *"any objection to this bill or its terms must be reported within 14 days after its receipt"*. The appellant had not complained about any of the invoices or the indorsement, and for some seven months had continued to honour the indorsed invoices. The appellant however refused to pay on about twenty of the invoices thus submitted, and subsequently sought to challenge the validity of the same. Before the trial Judge the appellant argued that the purchase orders in respect of the disputed invoices each bore a cautionary remark that *"cost of these stocks will be contra against cost of stocks returned to Chemitrade ..."*, and that in view of the contras made, there was no payment due from it to Chemitrade on these purchase orders. The appellant also disputed the construction which the respondent had placed upon the factoring agreement aforesaid.

The trial Judge in essence held (1) that the respondent was not aware of the alleged cautionary statement on the purchase orders and therefore could not be faulted for sending the impunged invoices (2) that the appellant was estopped from challenging the validity of

the invoices or the indorsement, and (3) that the respondent was entitled to assume at the end of the 14 day period, in the absence of complaints from the appellant, that the invoices were good for payment. The appellant appealed and before the Federal Court the main issue that arose was whether, in the circumstances, estoppel would apply to bar the appellant from challenging the validity of the invoices or the indorsement in question.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] There is not a shred of evidence to suggest that the respondent had knowledge of the purchase orders or of the cautionary statement appearing thereon, when it sent the indorsed invoices to the appellant. The trial Judge was thus right when he rejected the appellant's contention on this point.

[2] The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. Estoppel is a doctrine of wide utility and could be resorted to in varying fact patterns to achieve justice. Indeed the circumstances in which the doctrine may operate are endless.

[3] It is not an integral part of the doctrine of estoppel that a litigant who invokes the doctrine of estoppel must prove that he was induced by the conduct of his opponent to act in a particular way, as all that a representee need do is to place sufficient material before a Court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Likewise, the requirement that the representee should have acted to his detriment is also not part of the doctrine. In this respect, all that needs to be shown is that, in the particular circumstances of a case, it would be unjust to permit the representor or encouragor to insist upon his strict legal rights.

[4] It is correct to state that estoppel is a matter which requires to be pleaded under the rules of Court, as exemplified by rr. 7(1) & 8(1) of O. 18 Rules of the High Court 1980. However, the requirement of these rules is sufficiently met if the material facts giving rise to estoppel are sufficiently pleaded without actually using the term "estopped". Thus, although Courts do normally require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular case out of the governing principle.

[5] A Court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interest of justice to do so. It is really a matter of the particular Judge who, when deciding where the justice of the case lies, must have due regard to all the circumstances of the case.

[6] Justice of the present case clearly lies in favour of considering the estoppel issue. At the time it received the said invoices of Chemitrade bearing the indorsement specifying the 14 day limit for objection, the appellant had a choice. It could have told the respondent that the 14 day limit was not part of the original arrangement, that it amounted to an abrogation of its rights and that it was not prepared to be bound by the limitation. But it did nothing of the sort. It did not however merely remain silent, for thereafter it actually made payments to those very invoices without any protest.

[7] A reasonable man similarly circumstanced as the respondent would have been entitled to assume, as the respondent did, that the appellant was agreeable to the imposition of the 14 day limit. The respondent was clearly influenced by the conduct of the appellant when it paid Chemitrade for those very invoices, and this the respondent would not have done had the appellant protested. The appellant's attempt to raise this point some seven months later,

must be classified as unconscionable and inequitable conduct. It ought not therefore to be perrmitted to question the validity of the indorsement.

[8] The appellant should be estopped from asserting that nothing was due on the impunged invoices. It was the appellant's silence during the 14 day period that led the respondent to make the payment that was due to Chemitrade. The respondent was therefore entitled to assume that the invoices were good for payment. It would be most unjust for the appellant to now suggest that the respondent ought not to have paid on the disputed invoices.

[9] Contemporaneous documents suggest that the appellant, Chemitrade and the respondent proceeded upon the erroneous assumption, started by the respondent, that the factoring agreement was indeed a good and valid assignment. The appellant had not disputed the construction that the respondent preferred upon the agreement and had chosen to go along with the interpretation. It would be unjust and unconscionable to permit the appellant to now challenge the meaning which the parties gave to the documents.

[Appeal dismissed].

AMALAN & PROSEDUR: *Estopel - Keperluan pliding yang wajar - Samada keperluan tercapai bilamana fakta-fakta material yang membangkitkan estopel diplidkan dengan secukupnya - Kegagalan untuk memplid - Samada semestinya fatal - Kewajipan Mahkamah - Keadilan kes - Samada Mahkamah perlu memutuskan di mana duduknya keadilan kes - Aturan 18 k. 7(1) & 8(1) - Kaedah-kaedah Mahkamah Tinggi 1980.*

AMALAN & PROSEDUR: *Estopel - Doktrin - Kegunaan - Samada satu prinsip yang fleksibel - Penyataan semula undang-undang - Keperluan bahawa representee mestilah dipaksa dan harus bertindak secara merugikan dirinya - Samada merupakan sebahagian dari doktrin estopel.*

KONTRAK: *Perjanjian pemfaktoran - Estopel - Invois diindorskan dengan terma baru oleh pemegang serahhak - Kegagalan untuk membantah - Perayu meneruskan pembayaran diatas invois selama tujuh bulan - Kesan - Samada perayu diestop dari menyangkal keesahan invois dan indorsmen.*

Ini merupakan satu rayuan terhadap penghakiman Hakim perbicaraan yang memutuskan bahawa di bawah terma-terma perjanjian pemfaktoran yang dimasuki antara responden dan sebuah syarikat bernama Chemitrade, perayu adalah bertanggungan untuk membayar responden RM203,072.56. Fakta-faktanya adalah bahawa Chemitrade telah menjual barangan secara kredit kepada perayu. Syarat-syarat kredit tersebut telah melemahkan aliran wang Chemitrade, dan untuk menyelesaikan masaalah Chemitrade telah memasuki satu perjanjian pemfaktoran dengan responden. Melalui perjanjian tersebut responden akan membeli invois-invois Chemitrade berhubung dengan barangan tersebut pada nilai diskaun, dan kemudiannya menuntut nilai sepenuhnya daripada perayu di penghujung tempoh kredit. Perjanjian ini telah disempurnakan dengan persetujuan perayu.

Berikutan dengan perjanjian tersebut, yang mana telah tafsirkannya sebagai "satu penyerahan hutang", responden telah membeli invois-invois tersebut daripada Chemitrade dan mengemukakannya kepada perayu untuk pembayaran. Pada setiap satu invois-invois tersebut responden telah endorskan kenyataan *"apa-apa bantahan kepada bil ini atau syarat-syaratnya haruslah dilaporkan dalam tempoh 14 hari dari penerimaannya."* Perayu telah tidak membuat apa-apa aduan atau sungutan mengenai mana-mana invois tersebut ataupun pengendorsan itu, dan selama lebihkurang tujuh bulan telah secara berterusan membuat pembayaran atas invois-invois yang telah diendorskan itu. Perayu namun begitu enggan untuk membayar bagi lebihkurang dua puluh dari invois-invois yang telah dikemukakan sedemikian

rupa, dan berikutan itu cuba mencabar keesahannya. Di hadapan Hakim perbicaraan perayu berhujah bahawa pesanan-pesanan belian berhubung dengan invois-invois yang dipertikaikan, setiap satunya mempunyai kenyataan amaran bahawa *"kos stok-stok ini akan dikontrakan dengan stok-stok yang dikembalikan kepada Chemitrade...."* dan memandangkan kontra telah dibuat, tidak terdapat apa-apa bayaran yang kena dibayar olehnya kepada Chemitrade atas pesanan-pesanan tersebut. Perayu telah juga mempertikaikan pentafsiran yang dibuat oleh responden terhadap perjanjian pemfaktoran tersebut.

Hakim perbicaraan secara intinya memutuskan (1) bahawa responden tidak mengetahui tentang kenyataan amaran yang terdapat pada pesanan-pesanan belian yang dikatakan itu dan dengan itu tidak boleh dipersalahkan kerana menghantar invois-invois yang telah dicabar itu (2) bahawa perayu telah diestop daripada mencabar keesahan invois-invois tersebut ataupun pengendorsan itu, dan (3) bahawa responden berhak untuk menganggap pada hujung tempoh 14 hari, dalam ketiadaan apa-apa aduan atau sungutan daripada perayu, bahawa invois-invois tersebut baik untuk dibayar. Perayu merayu dan di hadapan Mahkamah Persekutuan isu utama yang terbit adalah samada, dalam hal keadaan disini, estopel terpakai untuk menghalang perayu daripada mencabar keesahan invois-invois tersebut atau pun pengendorsan yang dipersoalkan itu.

Diputuskan:

Oleh Gopal Sri Ram, HMR (menyampaikan penghakiman Mahkamah);

[1] Tidak terdapat sedikit pun keterangan bagi menyarankan bahawa responden mengetahui tentang pesanan-pesanan belian tersebut atau mengenai kenyataan amaran yang terdapat padanya, bilamana ia mengirimkan invois-invois yang telah diendorskan kepada perayu. Hakim perbicaraan adalah dengan itu betul bilamana beliau menolak penegasan perayu tentang perkara ini.

[2] Masanya telah tiba bagi Mahkamah ini mengiktirafkan bahawa doktrin estopel adalah prinsip yang fleksibel melalui mana keadilan dilakukan menurut keadaan kes tersebut. Estopel adalah doktrin yang mempunyai kegunaan yang luas dan boleh digubalkan dalam pelbagai sifat fakta bagi mencapai keadilan. Sesungguhnya keadaan-keadaan dalam mana doktrin tersebut boleh beroperasi adalah tidak berakhir.

[3] Ianya bukan bahagian penting doktrin estopel bahawa litigan yang menggunakan doktrin estopel mesti membuktikan bahawa beliau dipaksa, disebabkan oleh kelakuan pihak lawannya untuk bertindak dalam sesuatu cara yang khusus, kerana apa yang harus dilakukan oleh seseorang representee hanyalah mengemukakan material yang secukupnya di hadapan Mahkamah daripada mana suatu inferens boleh diambil bahawa beliau telah dipengaruhi oleh perlakuan pihak lawannya. Begitu juga kehendak bahawa representee seharusnya bertindak dengan cara yang merugikannya bukanlah sebahagian daripada doktrin tersebut. Sehubungan dengan ini apa yang harus ditunjukkan hanyalah bahawa dalam halkeadaan sesuatu kes itu, adalah tidak adil untuk membenarkan seseorang representee atau penggalak untuk menggesa terhadap hak undang-undangnya yang ketat.

[4] Adalah betul untuk menyatakan bahawa estopel merupakan perkara yang perlu diplidkan di bawah kaedah-kaedah Mahkamah, sepertimana yang dicontohkan oleh k. 7(1) dan 8(1) Kaedah-kaedah Mahkamah Tinggi 1980. Walaubagaimanapun, kehendak-kehendak kaedah ini boleh dipenuhi secukupnya tanpa menggunakan ungkapan "estop". Dengan itu, walaupun Mahkamah-mahkamah selalunya memerlukan supaya estopel diplidkan, terdapat juga pengiktirafan kehakiman tentang keadaan-keadaan yang akan mengeluarkan sesuatu kes daripada penguasaan prinsip ini.

[5] Mahkamah boleh membenarkan seseorang litigan berhujah bahawa pihak lawannya diestop daripada membangkitkan sesuatu penegasan yang khusus jika ianya demi kepentingan keadilan untuk melakukan demikian. Ianya adalah sebenarnya suatu perkara bagi seseorang Hakim bila memutuskan di mana terdapatnya keadilan kes itu, untuk memikirkan kesemua halkeadaan kes tersebut.

[6] Keadilan kes semasa ini jelas memihak kepada memberi pertimbangan kepada estopel. Pada waktu menerima invois-invois Chemitrade tersebut yang mempunyai pengendorsan yang menentukan tempoh selama 14 hari untuk membuat bantahan, perayu mempunyai pilihan. Ia boleh memberitahu respoden bahawa had masa selama 14 hari bukannya sebahagian daripada persetujuan asal, bahawa ianya membawa kepada suatu abrogasi terhadap hak-haknya, dan bahawa ianya tidak bersedia untuk terikat oleh penghadan tersebut. Tetapi ia tidak melakukan sedemikian. Bagaimanapun ia tidak berdiam sahaja, kerana selepas itu ia telah membuat pembayaran-pembayaran kepada invois-invois itu tanpa apa-apa bantahan.

[7] Seeorang yang berfikiran waras, dalam keadaan yang serupa dengan responden berhak untuk menganggap, sepertimana yang telah dilakukan oleh responden, bahawa perayu bersetuju dengan pengenaan tempoh had selama 14 hari itu. Responden dengan itu telah dengan jelasnya terpengaruh dengan kelakuan perayu bilamana ia membayar Chemitrade bagi invois-invois tersebut dan ini tentunya tidak akan dilakukan responden sekiranya perayu telah membantah. Percubaan perayu untuk membangkitkan perkara ini lebihkurang tujuh bulan kemudiannya, haruslah dikelaskan sebagai kelakuan yang tidak patut dan tidak saksama. Ianya dengan itu tidak seharusnya dibenarkan untuk mempersoalkan pengendorsan tersebut.

[8] Perayu seharusnya diestop daripada menegaskan bahawa tidak ada apa-apa yang kena bayar ke atas invois-invois yang telah dicabar itu. Ianya adalah disebabkan oleh tiada tindakan daripada perayu dalam tempoh 14 hari tersebut yang membawa kepada responden membuat pembayaran berkenaan kepada Chemitrade. Responden dengan itu berhak untuk menganggapkan bahawa invois-invois tersebut adalah baik atau sesuai untuk dibayar. Adalah tidak adil bagi perayu untuk kini menyarankan bahawa responden seharusnya tidak membayar invois-invois yang dipertikaikan.

[9] Dokumen-dokumen semasa menyarankan bahawa perayu, Chemitrade dan responden telah meneruskan tanggapan salah, yang telah dimulakan oleh responden, bahawa perjanjian pemfaktoran tersebut adalah suatu penyerahhakan yang wajar dan sah. Perayu telah tidak mempertikaikan pentafsiran yang dipersetujui oleh responden itu, dan telah memilih untuk menerima tafsiran tersebut. Ianya menjadi tidak adil dan tidak wajar untuk membenarkan perayu untuk kini mencabar maksud yang telah diberikan oleh pihak-pihak tersebut kepada dokumen-dokumen itu.

[Rayuan ditolak].

Cases referred to:

Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd. [1980] 2 MLJ 9 ***(refd)***

Associated Pan Malaysia Cement Sdn. Bhd. v. Syarikat Teknikal & Kejuruteraan Sdn. Bhd. [1990] 3 MLJ 287 ***(refd)***

Lal Somnath Singh & Ors. v. Ambika Prasad [1950] AIR All. 121 ***(foll)***.

Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors. [1995] 1 MLJ 308 ***(refd)***.

Laws Holdings Pty. Ltd. v. Short & Ors. [1972] 46 ALJR 563 ***(refd)***

Coppinger v. Norton [1902] 2 Ir. R. 232 ***(refd)***

Co-operative Town Bank v. Shanmugam Pillay AIR. Rang. 265 ***(refd)***

Rosita bte Baharom & Anor. v. Sabedin bin Salleh [1992] 1 MLJ 379, [1993] 1 MLJ 393 ***(refd)***

Oversea-Chinese Banking Corporation Ltd. v. Philip Wee Kee Puan [1984] 2 MLJ 1 ***(refd)***
Habib Bank Ltd. v. Habib Bank A.G. Zurich [1981] 1 WLR 1265 ***(refd)***
Haji Mohamed Dom v. Sakiman [1956] MLJ 45 ***(overruled)***
Anjalai Ammal & Anor. v. Abdul Kareem [1969] 1 MLJ 22 ***(overruled)***
Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. & Ors. [1986] AC 80 ***(dist)***
United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn. Bhd. [1993] 1 MLJ 182 ***(dist)***
Templeton v. Low Yat Holdings Sdn. Bhd. [1989] 2 MLJ 202 ***(refd)***
Sarat Chunder Dey v. Gopal Chunder Laha LR 19 IA. 203 ***(refd)***
Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] QB 84 ***(foll)***
Commissioner For Religious Affairs, Trengganu v. Tengku Mariam binti Tengku Sri Wa Raja [1970] 1 MLJ 222 ***(refd)***
Taylor Fashions Ltd v. Liverpool Victoria Trustees [1981] 2 WLR 576 ***(refd)***
Waltons Stores (Interstate) Ltd. v. Maher [1988] 164 CLR 387 ***(refd)***
Spiro v. Lintern [1973] 1 WLR 1002 ***(refd)***
The American Surety Co. of New York v. The Calgary Milling Co. Ltd. [1919] 48 DLR 295 ***(refd)***
De Tchihatchef v. The Salerni Coupling Ltd. [1932] 1 Ch. 330 ***(refd)***
Dawsons Bank v. Nippon Menkwa Kabushiki Kaisha LR 62 IA 100 ***(refd)***
Lim Teng Huan v. Ang Swee Chuan [1992] 1 WLR 113 ***(refd)***
Dickerson v. Colgrove [1880] 100 US 578 (25 L. Ed. 618) ***(refd)***
De Bussche v. Alt 8 Ch. D. 286 ***(refd)***
MAA Holdings v. Ng Siew Wah [1986] 1 MLJ 170 ***(refd)***
W.J. Alan & Co. Ltd. v. El Nasr Export & Import Co. [1972] 2 QB 189 ***(refd)***
Wong Juat Eng v. Then Thaw Eu [1965] 2 MLJ 213 ***(refd)***
Arab-Malaysian Merchant Bank Bhd. v. Esso Production Malaysia Inc. [1992] 2 CLJ 989 ***(refd)***

Legislation referred to:
Limitation Act, 1952
Rules of the High Court, 1980, O. 18 rr. 7(1) & 8(1).

For the appellant - D.P. Naban (K.A. Gan with him); M/s. Lee Hishamuddin
For the respondent - Vijay Kumar Natarajan (S.C. Chan with him); M/s. Kumar Jaspal Quah & Aishah

JUDGMENT

Gopal Sri Ram JCA:

After a short trial at which *viva voce* evidence was led, and at the conclusion of which written argument was put in, Abdul Malek J, in a reserved decision which he handed down on 24 November 1993, entered judgment for the respondent in the sum of RM203,072.56 with interest. He also awarded half the costs of the suit. By the same order, he dismissed two other items claimed by the respondent totaling about RM95,000. The appellant appealed against the finding of liability against it, while the respondent cross-appealed against the refusal of the learned Judge to enter judgment in its favour for the two sums we spoke of a moment ago.

The respondent's writ, as originally framed, claimed a sum of RM391,832.53. On 6 May 1992, the High Court, upon a summons for judgment, entered judgment for the sum of RM93,431.75 and gave the appellant unconditional leave to defend as to the balance. It is pursuant to that order that the trial mentioned earlier took place, resulting in respect of which the appeal and cross-appeal are directed.

The background to the dispute between the parties may be shortly stated.

A company known as Chemitrade Sdn. Bhd. ("Chemitrade") sold and delivered goods to the appellant for distribution to retailers. The sales were on credit. That meant that Chemitrade,

after delivering the goods, had to wait for a period of time before receiving payment from the appellant. At the material time, the appellant owed Chemitrade approximately RM45,000. This apparently placed some constraint on Chemitrade's purse. It needed money for its business.

So on 23 October 1989, Chemitrade entered into an agreement ("the Factoring Agreement") with the respondent under the terms of which the respondent agreed to factor Chemitrade's book debts. The arrangement works in this way.

A manufacturer or supplier would sell its goods to a third party on credit. It would raise an invoice against the buyer for the sale. It then has a choice. It could wait until the end of the credit period expired and claim payment on the invoice. Or it could "sell" the invoice to a factoring house, such as the respondent, at a discount and almost immediately receive a percentage of the face value of the invoice. The factoring house having paid on the invoice then informs the buyer (with whose consent the arrangement has been entered into) that at the expiry of the original period of credit the full amount due on the invoice should be paid to it.

This, more or less, is the process that is known to men of commerce as "factoring". The agreement which the respondent had with Chemitrade was along these lines. In order to properly work it requires the cooperation of the buyer. It is a device of great benefit to manufacturers and suppliers of goods because it provides them with a steady stream of cashflow. The Courts should, as far as possible, uphold such transactions. Indeed, our Courts have in the past done so in respect of similar transactions. See, *Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd.* [1980] 2 MLJ 9. For purposes of enforcement, the law generally places factoring arrangements in the category of assignments. They may be legal or equitable.

By a letter dated 13 February 1990, Chemitrade gave the appellant notice of the assignment to the respondent of the debts owed it by the appellant. It was copied to the respondent. Among other things, it recites that a sum of approximately RM45,000 was then due from the appellant to Chemitrade. The letter has a footnote which reads as follows:

> We acknowledge that we have notice of the above Factoring arrangement between Arab-Malaysian Merchant Bank Berhad and Chermitrade Sdn Bhd and confirm that the above outstanding amount is correct.

Below that footnote appears a signature of someone described as the authorised officer of the appellant.

On the following day, that is 14 February 1990, the respondent wrote to the appellant a letter in the following terms:

> Arab-Malaysian Merchant Bank Berhad (Factoring Department)
>
> Date: 14 Feb 1990
>
> Boustead Trading Sdn Bhd
> 21st Floor Menara Boustead
> 69 Jalan Raja Chulan
> 50200 Kuala Lumpur
>
> Dear Sirs,
>
> **Re: Assignment of debts from: Chemitrade Sdn Bhd.**
>
> We refer to the letter from the supplier to you and write to confirm that **we have entered into a Factoring Agreement with the abovementioned company whereby they have assigned to us** all receivables presently or hereafter due from you.

> Kindly take note of the above arrangement and pay to AMMB-Factoring all receivables as and when they same become due and payable, until such time as we shall notify you in writing to the contrary.
>
> Thank you.
>
> Yours faithfully,
>
> Sgd. (Emphasis added.)

Following this correspondence, for a period of about seven months, Chemitrade sold and delivered goods to the appellant. In respect of each sale, the appellant issued a purchase order to Chemitrade which in turn issued an invoice to the appellant indicating a credit period of two months from the date of the invoice. Chemitrade then handed a copy of the invoice to the respondent who sent it to the appellant after having rubber stamped it with the following endorsement:

> **Notice Of Assignment**
>
> Payable to Arab-Malaysian Merchant Bank Bhd. 23rd Floor, Bangunan Arab-Malaysian, No. 55, Jalan Raja Chulan, (P.O. Box. 11471, 50746 Kuala Lumpur) who has purchased this account. Remittance is to be made directly to them. **Any objection to this bill or its terms must be reported to them within 14 days after its receipt.** (When making payment please make cheque to AMMB Factoring). (Emphasis added.)

It is common ground that the appellant did not make any complaint about **any** of the invoices thus indorsed and sent by the respondent to it within the period of fourteen days prescribed by the indorsement. Neither did the appellant make any contemporaneous challenge as to the right of the respondent to impose the fourteen day period by way of the indorsement. It is also not in issue that the appellant, without raising any question on either of these points paid the respondent on several of the invoices. However, the appellant refused to make payment on about twenty invoices sent it by the respondent and these are the only ones that form the subject matter of the litigation between the parties. The appellant's refusal arose in this way.

In respect of some of the goods ordered by the appellant from Chemitrade, the appellant's purchase orders contained the following cautionary statement:

> Remark: Cost of these stocks will be contra against cost of stocks returned to Chemitrade from BTSB w/hse for banding on 2pcs Lux soap promotion.

The appellant's case is that nothing was due from it to Chemitrade upon these purchase orders. Consequently, it is in respect of the invoices issued by Chemitrade against those purchase orders bearing this cautionary statement that the appellant refused payment.

According to the appellant, a copy of each of the purchase orders bearing the cautionary statement was in the hands of the respondent when it served upon the appellant the invoices carrying the indorsement to which we have already adverted. The respondent therefore, at all material times, was aware, says the appellant, that no payment was due from it to Chemitrade on these invoices. Since the respondent paid Chemitrade on these invoices knowing that nothing was due on them from the appellant, the loss must be borne by the respondent: so the argument goes. The merits of this argument must await comment. For the moment we shall deal with the evidence upon the matter.

Following the appellant's refusal to pay upon the disputed invoices, two meetings were held between the representative of the appellants and that of the respondent. The first took place on 9 November 1990; the second on 15 November 1990. An examination of the

correspondence which followed these meetings shows that no discussion took place about the disputed **purchase orders** or the respondent's knowledge of their existence or for that matter the existence of the cautionary statement appearing upon them. On the other hand, there is the evidence of the appellant's own witness to the effect that the respondent's representative registered surprise when told, at the first of these meetings, that no debt was available for factoring upon some of the invoices. What comes across quite clearly from the contemporaneous correspondence is this. The appellant had not taken any challenge as to the validity of any invoices in question within the fourteen day period prescribed in the rubber stamped indorsements. In consequence thereof, the respondent had been led to assume or to believe that all was well with the invoices. The respondent, acting upon that assumption, had factored the invoices and had paid off Chemitrade the percentage that was due to it under these invoices. It would not have done so but for the appellant's silence.

Faced with this evidence it is hardly surprising that the learned trial Judge found for the respondents. It is quite apparent from his judgment that he did not accept the contention that the respondent was aware of those purchase orders that carried the cautionary statement.

The state of mind of the respondent, or more appropriately the state of mind of its authorised officers, is a conclusion of fact to be arrived at by the learned trial Judge who had the audio-visual advantage and to whom the law entrusts the task of primary evaluation of the evidence. An appellate Court will be extremely reluctant to interfere with the conclusions of fact reached by a trial Judge. That is not to say that it will **never** interfere in all such cases. But the category of cases warranting appellate interference is well settled and it is quite sufficient to say that the present appeal does not fall within any class of case in that category. Further, having undertaken an independent review of the material, both printed and documentary, we are satisfied that there is not a shred of evidence to suggest that the respondent had knowledge of the purchase orders or of the cautionary statement appearing thereon, when it sent the indorsed invoices to the appellant.

Encik Naban who appeared for the appellant before us (but not in the Court below) criticised the learned Judge's judgment on two grounds. His first argument was directed against the trial Judge's acceptance of the proposition that the respondent was entitled to rely on the endorsement it had placed on the invoices forwarded to the appellant. According to the learned Judge, the respondent was entitled to assume at the end of fourteen days, in the absence of any complaint from the appellant, that the invoices were good for payment. Counsel submitted that this finding was wrong because the respondent, as assignee, could not unilaterally impose a fourteen day limit in the absence of an agreement to that effect between the appellant and Chemitrade.

Now the evidence reveals that the very first invoice carrying the endorsement was sent to and received by the appellant in April 1990. That invoice was honoured without complaint. The appellant did not lodge any protest with the respondent about the latter's right to impose the fourteen day limit. Then, for a period of about seven months many invoices bearing the identical endorsement were sent by the respondent to the appellant. Throughout this period there was not a whisper from the appellant about the validity of the endorsement. In these circumstances was the respondent entitled to assume that the appellant had accepted the fourteen day time limit as a term of the factoring arrangement? We apprehend that the answer to this question lies in the proper application of the doctrine of estoppel. But, says Encik Naban, estoppel must be pleaded: here it never was. So, he argues, no resort may be had to that doctrine in aid of the proposition that found favour with the trial Judge.

Now it is quite correct to state that Courts have in their decisions identified estoppel as a matter which requires to be pleaded under the rules of Court. (See, *Associated Pan Malaysia Cement Sdn. Bhd. v. Syarikat Teknikal & Kejuruteraan Sdn. Bhd.* [1990] 3 MLJ 287, 296). The operative rule is said to be 0. 18 r. 8(l) of the Rules of the High Court, 1980, although, in our view**,** r. 7(l) of that Order is of equal importance because of the substantive law upon the subject of estoppel. These two rules read as follows:

> 7. (1) Subject to the provisions of this rule and rr. 10, 11 and 12, every pleading must contain**,** and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.
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> ...
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> 8. (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, perfomance, release, any relevant statute of limitation, fraud or any fact showing illegality:
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> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

In our judgment, the requirement of these rules is sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term "estopped". See, *Lal Somnath Singh & Ors. v. Ambika Prasad* AIR [1950] All. 121, 131.) It may be desirable for a pleader to use that term; but it is not fatal if he does not. One must not lose sight of the object of modern pleadings which is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors.* [1995] 1 MLJ 308, 320.

Thus, although Courts, through their pronouncements, require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular case out of the governing principle. First, there is the principle, already alluded to, that what requires to be pleaded are the relevant facts which a litigant claims to give rise to an estoppel and not any special formula in staccato: *Laws Holdings Pty. Ltd. v. Short & Ors.* [1972] 46 ALJR 563, 571.

Secondly, even where a party has failed to set out the material facts in his pleading, but there is occasioned no surprise to his opponent, a Court may, in the interests of justice, permit the point to be taken: *Coppinger v. Norton* [1902] 2 Ir. R. 232, 243; *Co-operative Town Bank v. Shanmugam Pillay* AIR. Rang. 265, 268; *Laws Holdings (supra).* Useful reference may also be had to the instructive judgment of Edgar Joseph Jr. J in *Rosita bte Baharom & Anor. v. Sabedin bin Salleh* [1992] 1 MLJ 379, affirmed by the Supreme Court in [1993] 1 MLJ 393.

Thirdly, where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a Court to consider the evidence and the submissions and come to a decision on the issue. It is no answer, in such circumstances, to say that the point was not pleaded: *Oversea-Chinese Banking Corporation Ltd. v. Philip Wee Kee Puan* [1984] 2 MLJ 1.

In *Habib Bank Ltd. v. Habib Bank A.G. Zurich* [1981] 1 WLR 1265, 1287 Oliver LJ dealt with an argument upon a point of pleading in the following way:

> Finally, there was, says Mr. Aldous, neither express allegation nor express proof that H.B.Z. had acted upon the encouragement. There is certainly an allegation in relation to estoppel in paragraph 15 of the defence that H.B.Z have relied upon the right to use their own name and motif and have been permitted by the plaintiffs to build up a goodwill therein. That goodwill, in fact, was amply proved by the banking documents and by H.B.Z's witnesses. I really cannot think that it was necessary formally to call a witness to say 'we did this in reliance upon the supposition that we were allowed to use our corporate name.' That reliance can be inferred from the circumstances as it was in *Greasley v. Cooke* [1980] 1 W.L.R. 1306 (see the judgment of Lord Denning MR, at p. 1307) and I think that the Judge was perfectly justified in inferring it from the evidence before him in this case.

It is to be emphasised that the categories of cases in which a Court may permit an unpleaded point to be argued are not closed and that the foregoing three classes of case are but mere illustrations of a much wider principle. It is this. A Court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interests of justice to do so. It is really a matter within the discretion of the particular Judge who, when deciding where the justice of the case lies, must have due regard to all the circumstances of the case, including any injury or prejudice that may be caused by the affected party being taken by surprise. If a Court comes to the conclusion that no injustice will be occasioned by permitting a party to raise estoppel as an issue, then, it may be justified in departing from the salutary rule contained in such decisions as *Haji Mohamed Dom v. Sakiman* [1956] MLJ 45 and *Anjalai Ammal & Anor. v. Abdul Kareem* [1969] 1 MLJ 22 that imposes upon a Judge the duty to strictly decide a case upon and only upon the issues raised in the pleadings and not upon an unpleaded case. Nevertheless, Courts must ensure that the occasions upon which such departure may be permitted are rare. For otherwise the rule which declares that a party is bound by its pleadings will be rendered meaningless.

That the justice of the case should be the overriding consideration is axiomatic. After all, Courts exist to do justice according to the law as applied to the substantial merits of a particular case. And rules of Court and of practice are created to facilitate the attainment of justice, not its obstruction.

Viewed from this standpoint, it appears quite clearly where the justice of the present case lies. It lies in favour of considering the estoppel issue. The record shows that the respondent had, at the trial, with no resistance being offered by the appellant, led a considerable body of oral and documentary evidence, the latter consisting of agreed documents upon the very issue which Encik Naban now says the Judge ought not to have considered. Additionally, lengthy written submissions were put in addressing the point. Accordingly, the learned Judge had little choice but to consider the inferential effect of the evidence. This he did and no criticism may be fairly directed against him for deciding the point. We may add that in deference to the careful argument of Counsel we have undertaken an independent assessment of the evidence and arrived at the same conclusion as the learned Judge.

To recount the facts, the appellant, after receiving the first invoice carrying the impugned indorsement and during the period of seven months thereafter did not challenge the respondent's right to insist upon the fourteen day period. Neither did the appellant challenge the validity of the impugned invoices during the relevant period of fourteen days. Although these two facts are evidentially connected, they must, for the purpose of applying the correct legal principles - principles that apply with equal force to answer all the submissions made on the appellant's behalf - be treated separately. And this we now propose to do.

We first take the appellant's failure to object to the imposition of the fourteen day period by the respondent. In meeting the point, Encik Naban says that even if estoppel is to be considered, all that his client was guilty of was mere silence. And mere silence, says Encik Naban, is insufficient to found an estoppel. In support of this submission he cites *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. & Ors.* [1986] AC 80, a decision of the Privy Council concerning, *inter alia*, the duty owed by a customer to his banker in respect of forged cheques. That decision was followed by the precursor of this Court in *United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn. Bhd*. [1993] 1 MLJ 182. The nature of the duty owed by a customer to his banker at common law was summarised by Anuar J. (now the Chief Judge of Malaya) in the latter case as follows:

> A consideration of the relevant authorities shows that at common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. The first duty is laid down by the decision of the House of Lords in *London Joint Stock Bank Ltd v Macmillan* ('the Macmillan duty'). The second was laid down by the decision in *Greenwood v. Martins Bank Ltd* ('the Greenwood duty').
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> ...
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> After a careful examination of the decisions of the superior courts of the Commonwealth, we are satisfied that there does not exist, at common law, a further duty on the part of a customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. **Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank.**

Lord Scarman who delivered the advice of the Board in *Tai Hing (supra)* having expressed the same view went on to deal with the question of estoppel. He said (at page 110):

> Their Lordships having held that the company was not in breach of any duty owed by it to the banks, it is not possible to establish in this case an estoppel arising from mere silence, omission, or failure to act.
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> Mere silence or inaction cannot amount to a representation unless there be a duty to disclose or act: *Greenwood's* case [1933] AC. 51, 57. And their Lordships would reiterate that unless conduct can be interpreted as amounting to an implied representation, it cannot constitute an estoppel: for the essence of estoppel is a representation (express or implied) intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss: *Greenwood's* case *per* Lord Tomlin, at p. 57.

It is quite clear that the Privy Council in *Tai Hing* was considering a case of estoppel by representation in circumstances in which there was no duty to speak and the plaintiff had merely remained silent. It was not a case where the customer had encouraged the bank to believe that the cheques were not forged. Had the evidence pointed in that direction, we have no doubt that the Privy Council would have arrived at the opposite conclusion upon the question of estoppel.

The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

Edgar Joseph Jr. J. (as he then was) in an illuminating judgment in *Templeton v. Low Yat Holdings Sdn. Bhd.* [1989] 2 MLJ 202, 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act, 1952.

The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA. 203; *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] QB 84. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner For Religious Affairs, Trengganu v. Tengku Mariam binti Tengku Sri Wa Raja* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v. Liverpool Victoria Trustees* [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd. v. Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro v. Lintern* [1973] 1 WLR 1002. It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case *(supra))* or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *The American Surety Co. of New York v. The Calgary Milling Co. Ltd.* [1919] 48 DLR 295; *De Tchihatchef v. The Salerni Coupling Ltd.* [1932] 1 Ch. 330; *Taylor Fashions (supra).*

We would add that it is wrong to apply the maxim "estoppel may be used as a shield but not a sword" as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v. Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100, 108:

> Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.
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> It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the non-existence of a fact. The decisions of the Privy Council in *Sarat Chunder Dey* and *The Calgary Milling Co* (among others) to which we have referred earlier concerned cases involving representations not of fact but of law.

The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at page 122) as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. **When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands.**
> (Emphasis added.)

In *Lim Teng Huan v. Ang Swee Chuan* [1992] 1 WLR 113 an appeal from Brunei Darussalam, the Privy Council, said that the decision in the *Taylor Fashions* case *(supra):*

> showed that, in order to found a proprietary estoppel, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did: it is enough if**,** in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make

per Lord Browne-Wilkinson at page 117.

The essential nature of the doctrine does not appear to be any different in American equity jurisprudence. This is reflected by the following passage in the opinion of the Supreme Court of the United States in *Dickerson v. Colgrove* [1880] 100 US 578, 580 (25 L. Ed. 618) delivered by Swayne J.:

> The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice.

Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Bussche v. Alt* 8 Ch. D. 286, 314:

> If a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

In *MAA Holdings v. Ng Siew Wah* [1986] 1 MLJ 170, George J. (now JCA) was faced with a case where the defendant had remained silent while the purchaser had paid monies to him. Of the defendant's silence that learned Judge said:

> Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirement to apply to the FIC although the parties had expressly agreed that whether the FIC approval was obtained or not was not to have any effect on the contract is I think the height of inequity. Robert Goff J. stated the principle of this aspect of equitable estoppel in *Societe Italo-Belge v. Palm Oils* [1982] 1 All ER 19, 26-27 thus:
>
> > The fundamental principle is that stated by Lord Cairns LC, *viz*, that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd v. High Trees House Ltd.* [1946] 1 All ER 256, [1947] K.B. 130, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a Court might well think it right to conclude that only after reasonable notice could the lessor return to charging

> rent at the higher rate specified in the lease. Furthermore it would be open to the Court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice.

Lord Denning in *WJ Alan & Co. Ltd. v. El Nasr Export & Import Co.* [1972] 2 QB 189 said:

> If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.

Before we conclude on the law upon the subject at hand, there are two elements of the doctrine of estoppel which we think require clarification and re-statement. The first concerns the effect which the representation or encouragement had upon the mind of the person relying upon the estoppel: the second has to do with the requirement that such a person should have acted to his detriment.

The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, having undertaken a careful examination of the authorities, we are of opinion that this requirement is not an integral part of the doctrine. All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a Court from which an inference may fairly be drawn that he was influenced by his opponent's actings. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that "his conduct was so *influenced* by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict legal rights." (Per Robert Goff J. in *Amalgamated Investment (supra)* at page 105 of the report.)

Taking now the requirement of detriment, it is quite apparent that in the early development of the doctrine, there are to be found in the judgments of eminent judges statements 'indicating that one who relies upon an estoppel must prove that he relied upon his opponent's conduct and in consequence acted to his detriment. And this view had found its way into the equity jurisprudence of Malaysia. (See, for example, *Wong Juat Eng v. Then Thaw Eu* [1965] 2 MLJ 213.) As has been seen, the former requirement, namely, that there ought to have been reliance was exploded by the decisions in *Amalgamated Investment*, in *Taylor Fashions* in *Societe Italo-Belge* (sub. nom.'The Post Chaser') and *Lim Teng Huan (supra)*.

We take this opportunity to declare that the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before the doctrine may be invoked. All that need be shown is that in the particular circumstances of a case it would be unjust to permit the representor or encouragor to insist upon his strict legal rights. In the resolution of this issue, a judicial arbiter would, when making his assessment of where the justice of the case lies, be entitled to have regard to the conduct of the litigant raising the estoppel. This may, but need not in all cases, include the determination of the question as to whether the particular litigant had altered his position, although such alteration need not be to his detriment.

We now turn to apply the law to the facts of the present appeal.

A close examination of the evidence shows that the instant appellant did not merely remain silent, as contended by Counsel on its behalf. This is what actually happened. The appellant received from the respondent invoices of Chemitrade bearing upon them the rubber stamped

endorsement specifying the fourteen day limit for objections. Now, the appellant at that stage had a choice. It could have told the respondent that the fourteen day limit was not part of the original arrangement, that this amounted to an abrogation of its rights and that it was not prepared to be bound by the limitation. But it did nothing of the sort. It did not merely remain silent. It actually made payments on those very invoices without any protest. A reasonable man similarly circumstanced as the respondent would have been entitled to assume as the respondent did, that the appellant was agreeable to the imposition of the fourteen day limit. Influenced - and we use that term deliberately - by the conduct of the appellant the respondent paid out on those very invoices. This the respondent would not have done had the appellant protested. The appellant's attempt to raise this point some seven months later, well after the respondent had paid out its money to Chemitrade, must, in our judgment be classified as unconscionable and inequitable conduct. It ought not therefore to be permitted to question the validity of the endorsement.

Much, if not all, of what we have said upon the effect of the indorsement applies with equal force to the complaint directed at the impugned invoices in respect of which the appellant says there was nothing due to Chemitrade. Again, we have the cumulative effect of the evidence pointing to the appellant's silence during the fourteen day period. At the end of that period, the respondent, who was unaware of the cautionary statement appearing on the face of the appellant's purchase orders, made payment of the percentage that was due to Chemitrade. It was entitled to assume that the invoices were good for payment because the appellant had done nothing to disabuse the respondent of the impression it had created in the latter's mind that the invoices were good for payment. It would be most unjust for the appellant to now suggest that the respondent ought not to have paid on the dispute invoices. The appellant should therefore be estopped from asserting that nothing was due on these invoices.

We now turn to address our minds to the second argument of Encik Naban to the effect that the Factoring Agreement entered into between the respondent and Chemitrade was not an assignment at all. In support of this argument, Counsel relied upon the judgment of Zakaria Yatim J (as he then was) in *Arab-Malaysian Merchant Bank Bhd. v. Esso Production Malaysia Inc.* [1992] 2 CLJ 989. Having read the judgment in that case (which dealt with an agreement in terms identical to the Factoring Agreement in the instant appeal) we are left in doubt as to the correctness of the decision. But we need not, because of the facts of the present case, go into that question in great detail.

In the present case, there are contemporaneous documents to suggest that the appellant, Chemitrade and the respondent proceeded upon the assumption - an erroneous assumption of law - that the Factoring Agreement was indeed a good and valid assignment. The respondent's letter to the appellant of 14 February 1990, which we have earlier reproduced, is a document in point. The letter says that there has been an assignment under the Factoring Agreement. It was open at that stage for the appellant to dispute the construction which the respondent placed upon that Agreement. But it did not do so. Instead it chose to go along with the respondent's interpretation of the document. Can it now say otherwise? We do not think it can. It would be unjust and unconscionable to permit the appellant to now challenge the meaning which the parties gave to the document.

It is now convenient to deal with the cross-appeal. We shall do so shortly. The cross-appeal turns upon the correctness of the decision of the learned Judge to disallow two items claimed by the respondent. The principal reason for the learned Judge disallowing the two items is that these reflected the expenses incurred by the appellant for the purpose of promoting the sales of Chemitrade's products which the appellant was entitled to set off against moneys

due from it.. If an action had been brought by Chemitrade to recover these items, then the appellant would have undoubtedly been entitled to maintain its set off. The respondent as assignee cannot place itself in a better position than the assignor. It must take the assignment subject to all rights of set off which the appellant as debtor may have against the assignor. The issues that lie at the heart of the cross-appeal resolve themselves as pure questions of fact. They are matters in respect of which we are not inclined to disagree with the views expressed by the learned Judge.

Satisfied as we were that the appeal and the cross-appeal were devoid of any merit, we had no alternative but to dismiss them. The appellant was directed to pay the costs of the appeal to the respondent. Likewise, the respondent was ordered to pay the appellant the costs of the cross-appeal. The deposit lodged by the appellant was ordered to be paid out to the respondent to account of its taxed costs.